

UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS  
KANSAS CITY DIVISION

UNITED STATES OF AMERICA and the  
KANSAS DEPARTMENT OF HEALTH AND  
ENVIRONMENT, and Roderick L. Bremby as  
Secretary of the KANSAS DEPARTMENT OF  
HEALTH AND ENVIRONMENT,

Plaintiffs,

v.

MAGELLAN AMMONIA PIPELINE, L.P.,  
ENTERPRISE OPERATING PRODUCTS, L.L.C.,  
and MID-AMERICA PIPELINE, L.L.C.,

Defendants

CIVIL ACTION NO:

COMPLAINT

The United States of America, by authority of the Attorney General through his undersigned attorneys, and at the request and on behalf of the United States Department of the Interior (DOI), in its capacity as natural resource trustee, the Kansas Department of Health and Environment (KDHE), and Roderick L. Bremby, Secretary of KDHE, in his capacity as Trustee for state natural resources in Kansas, allege as follows:

NATURE OF ACTION

1. This is a civil claim for natural resource damages brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), and Section 311 of the Clean Water Act ("CWA"), 33 U.S.C. § 1321, for damages for injury to, destruction of, or loss of natural resources in or near Kingman, Kansas resulting from the release of anhydrous ammonia from a pipeline owned and operated by Defendants on or about October 27, 2004.

JURISDICTION AND VENUE

2. This court has jurisdiction over the subject matter of this claim pursuant to 28 U.S.C. §§ 1331, 1345, 1362 and 2201; 42 U.S.C. §§ 9607(a) and 9613(b); and 33 U.S.C. §§ 1321(e)(2) and (n).

3. Venue is proper in this district pursuant to Section 113(b) of CERCLA, 42 U.S.C.

§ 9613(b); 33 U.S.C. § 2717(b); and 28 U.S.C. § 1391(b).

#### PARTIES

4. Defendant Magellan Ammonia Pipeline, L.P. (“Magellan”) is a corporation organized under the laws of Delaware with its principal place of business located in Phoenix, Arizona. Magellan conducts business in the State of Kansas.

5. Defendant Enterprise Operating Products, L.L.C. (“Enterprise”) is a corporation organized under the laws of the State of Delaware and conducts business in the State of Kansas

6. Defendant Mid American Pipeline L.L.C. (“MAPL”) is incorporated in Delaware and conducts business in the State of Kansas.

7. Plaintiff the United States of America is a trustee for natural resources injured, destroyed or lost as a result of release of anhydrous ammonia from the pipeline owned and operated by the Defendants pursuant to federal statutes including but not limited to Section 107(f)(2)(A) of CERCLA, 42 U.S.C. § 9607(f)(2)(A), and Section 311(f)(5) of the Clean Water Act, 33 U.S.C. § 1321(f)(5). *See* Exec. Order No. 12,580, as amended by Exec. Order No. 12,077, 61 Fed. Reg. 45871 (Aug. 28, 1996); 40 C.F.R. § 300.600(b)(2).

8. Plaintiffs KDHE and the Secretary of KDHE are state trustees for natural resources injured, destroyed or lost as a result of release of anhydrous ammonia from the pipeline owned and operated by the Defendants pursuant to statutes including but not limited to Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section 311(f)(5) of the CWA, 33 U.S.C. § 1321(f)(5), 40 C.F.R. § 300.605, and K.S.A. 61 - 171u.

#### GENERAL ALLEGATIONS

9. Defendant Magellan owns an 1100 mile anhydrous ammonia pipeline that runs through six states from Borger, Texas to Mankato, Minnesota (“Pipeline”).

10. Defendant Enterprise was an operator of the Pipeline from 2003 to 2007.

11. Defendant MAPL was an operator of the Pipeline from 2003 to 2007.

12. On or about October 27, 2004, a break in the Pipeline resulted in the release of over 1 million pounds of anhydrous ammonia from the Pipeline into and around an un-named

Tributary to Smoots Creek, Smoots Creek and the Ninneschah River in and near Kingman, Kansas. (Hereinafter referred to as the "Kingman Release").

13. Investigations conducted by the Defendants and the State of Kansas in cooperation with the U.S. Department of Interior and other parties have concluded that the Kingman Release resulted in the contamination of aquatic resources with anhydrous ammonia which injured Natural Resources including, but not limited to, habitat, fish and macroinvertebrates in an un-named tributary leading to Smoots Creek and Smoots Creek.

#### RELEVANT LEGAL AUTHORITIES

14. Section 107(a) of CERCLA, 42 U.S.C. § 9607, provides that the owner or operator of a facility from which hazardous substances have been released is liable for "the damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."

15. Anhydrous Ammonia is a hazardous substance within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 40 C.F.R. § 302.6.

16. Under Section 107 of CERCLA, 42 U.S.C. § 9607, and 43 C.F.R. Part 11, the Plaintiffs, in their roles as natural resource trustees, are entitled to recover damages for injury to natural resources, including (1) the cost to restore, replace, or acquire the equivalent of such natural resources; (2) the compensable value of lost services resulting from the injury to resources; and (3) the reasonable cost of assessing injury to the natural resources and the resulting damages.

17. Section 311(b)(3) of the Clean Water Act, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil or hazardous substances in a harmful quantity to the navigable waters and adjoining shorelines of the United States.

18. Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), provides that the owner or operator of any facility from which oil or a hazardous substance has been discharged in violation of Section 311(b)(3) of the CWA is liable for any costs or expenses incurred by the United States or State "in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge."

19. Anhydrous Ammonia is a hazardous substance within the meaning of Section 311(a)(14) of the Clean Water Act, 33 U.S.C § 1321(a)(14), and pursuant to Section 311(b)(4) of the CWA, EPA has determined that amounts over 100 lbs of anhydrous ammonia may be harmful. See 33 U.S.C. § 1321(b)(4); 40 C.F.R. § 117.1(a), 117.3.

20. KSA 65-171u provides that any person who violates the provisions of KSA 65-171 and causes the death of, or injury to, fish, animals, vegetation or other resources of the state whether natural or structural . . . shall be liable to pay the state damages in an amount equal to the sum of money necessary to restock such waters, replenish or replace such resources and to otherwise restore the stream, lake or other water resource to its condition prior to the injury.

21. KSA 65-164 states in pertinent part, subsection (a) "No person, company, corporation . . . shall place or permit to be placed or discharge or permit to flow into any of the waters of the state any sewage . . . (b) For the purposes of this act "sewage" means the waste products . . . or other discharges . . . or other waste from manufacturing or other forms of industry."

#### FIRST CLAIM FOR RELIEF

##### Natural Resource Damages Under CERCLA as to All Defendants

22. The allegations set forth in paragraphs 1 through 21 are re-alleged and incorporated herein by reference.

23. Each Defendant is a person within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

24. The Pipeline is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

25. In the Kingman Release, Anhydrous Ammonia was "released" from the Pipeline into the "environment" within the meaning of Sections 101(22) and 101(8) of CERCLA, 42 U.S.C. § 9601(22) and (8).

26. Anhydrous Ammonia is a "hazardous substance" within the meaning of Section 101(14) of CERCLA. 42 U.S.C. § 9601(14).

27. Defendant Magellan was the “owner” of the Pipeline within the meaning of Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A), at the time of the Kingman Release.

28. Defendant Enterprise was an “operator” of the Pipeline within the meaning of Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A), at the time of the Kingman Release.

29. Defendant MAPL was an “operator” of the Pipeline within the meaning of Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A), at the time of the Kingman Release.

30. The Kingman Release resulted in the injury to, destruction of, and loss of natural resources in and near Kingman, Kansas, within the meaning of Sections 101(16) and 107(a)(4)(C) of CERCLA, 42 U.S.C. §§ 9601(16); 9607(a)(4)(C).

31. The United States has incurred and continues to incur costs related to the assessment of the loss of natural resources for which the United States is a trustee, resulting from Kingman Release.

32. KDHE incurred costs related to the assessment of the loss of natural resources for which KDHE is a trustee, resulting from the Kingman Release.

33. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the Defendants are liable to the Plaintiffs for damages for injury to, destruction of, or loss of natural resources at the Site, including the reasonable costs of assessing such injury, destruction, or loss, resulting from the Kingman Release.

## SECOND CLAIM FOR RELIEF

### Natural Resource Damages Under the Clean Water Act as to All Defendants

34. The allegations set forth in paragraphs 1 through 33 are re-alleged and incorporated herein by reference.

35. The Pipeline is an “onshore facility” within the meaning of Section 311(f)(2) of the CWA, 33 U.S.C. § 1321(f)(2).

36. A discharge of Anhydrous Ammonia in a harmful quantity within the meaning of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), occurred in the Kingman Release into an un-named tributary to Smoots Creek, into Smoots Creek, and into the Ninneschah River and the adjoining shorelines thereof.

37. The un-named tributary, Smoots Creek and the Ninneschah River are navigable waters of the United States within the meaning of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3).

38. Anhydrous Ammonia is a hazardous substance within the meaning of Sections 311(a)(14) and (b)(3) of the Clean Water Act, 33 U.S.C. §§ 1321(a) (14) & (b)(3).

39. The amount of Anhydrous Ammonia discharged from the Pipeline in the Kingman Release exceeded the amount that EPA has determined may be harmful under Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4).

40. The Kingman Release damaged or destroyed natural resources belonging to, appertaining to, or under the exclusive management authority of the Plaintiffs within the meaning of Sections 311(b) and (f)(4) of the CWA, 33 U.S.C. §§ 1321(b) & (f)(4).

41. Defendant Magellan was an “owner” of the Pipeline within the meaning of Section 311(f)(1) of the CWA, 33 U.S.C. § 1321(f)(1), at the time of the Kingman Release.

42. Defendant Enterprise was an “operator” of the Pipeline within the meaning of Section 311(f)(1) of the CWA, 33 U.S.C. § 1321(f)(1), at the time of the Kingman Release.

43. Defendant MAPL was an “operator” of the Pipeline within the meaning of Section 311(f)(1) of the CWA, 33 U.S.C. § 1321(f)(1), at the time of the Kingman Release.

44. The Defendants are liable to Plaintiffs for the costs or expenses incurred by Plaintiffs in the restoration or replacement of natural resources damages or destroyed as a result of the Kingman Release under Section 311(f)(4) of the CWA, 33 U.S.C. § 1321(f)(4).

### THIRD CLAIM FOR RELIEF:

#### Natural Resource Damages under KSA 65-171u

45. The allegations set forth in paragraphs 1 through 44 are re-alleged and incorporated herein by reference.

46. The Defendants have discharged or permitted sewage to flow into the waters of the State in violation of KSA 65-164.

47. The discharges described above have caused the death of, or injury to, fish, animals, vegetation or other resources of the state.

48. Pursuant to KSA 65-171u the Defendants are liable to pay the state damages in an amount equal to the sum of money necessary to restock such waters, replenish or replace such resources and to otherwise restore the stream, lake or other water resource to its condition prior to the injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Enter a judgment in favor of Plaintiffs against Defendants, for liability pursuant to CERCLA Section 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C), for all damages for injury to, destruction of, and loss of natural resources within the trusteeship of the United States, KDHE, and the Secretary of KDHE resulting from the Kingman Release including the unreimbursed past, present, and future costs of assessing such damages, the cost of restoring, replacing, and/or acquiring the equivalent of those injured resources, and the past, present, and future diminution in value of those resources pending restoration or replacement;

(2) Enter a judgment in favor of Plaintiffs against Defendants, pursuant to Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), for all costs of restoring, replacing, and/or acquiring the equivalent of natural resources damaged or destroyed as a result of the Kingman Release, including the costs of assessing such damages and the diminution in value of those resources pending restoration or replacement;

(3) Enter a judgment in favor of Plaintiff the State of Kansas against Defendants pursuant to KSA 65-171u for the amount equal to the sum of money necessary to restock state waters, replenish or replace resources and to otherwise restore the stream, lake or other water resource to its condition prior to the injury asserted herein;

(4) Enter a judgment in favor of Plaintiffs against Defendants for all costs of this action, including attorney's fees; and

(5) Award Plaintiffs such other and further relief as this Court may deem appropriate.

Respectfully submitted,

FOR THE UNITED STATES:

BRUCE GELBER  
Section Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice

Trial Attorney  
Environmental Enforcement Section  
United States Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
(202) 514-4180 fax  
(202) 616-8916 direct

ERIC F. MELGREN  
United States Attorney  
District of Kansas

EMILY METZGER  
Assistant United States Attorney  
Kansas State Bar No. 10750  
1200 Epic Center, 301 N. Main  
Wichita, Kansas 67202  
(316) 269-6481

OF COUNSEL:

Amanda Kohler  
Solicitor's Office  
U.S. Department of Interior  
Denver, CO



FOR THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

Dated: 9/19/08

~~Roderick L. Bremby~~, ~~Secretary~~  
Kansas Department of Health and Environment

Dated: 9/19/08

~~L. Patricia Casey~~  
Special Assistant Attorney General  
Kansas Department of Health and Environment

**UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS  
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UNITED STATES OF AMERICA and the  
STATE OF KANSAS, by and through the  
KANSAS DEPARTMENT OF HEALTH AND  
ENVIRONMENT,

Plaintiffs,

v.

MAGELLAN AMMONIA PIPELINE, L.P.;  
ENTERPRISE PRODUCTS OPERATING, L.P.;  
and MID-AMERICA PIPELINE COMPANY, LLC,

Defendants.

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NO.

CONSENT DECREE

This Consent Decree ("Consent Decree") is made and entered into by and among the United States of America ("the United States"), on behalf of itself and the Department of the Interior ("DOI") in its capacity as trustee for federal Natural Resources, and the State of Kansas by and through the Kansas Department of Health and Environment ("KDHE") and Roderick L. Bremby, Secretary of KDHE in their capacity as trustee for state Natural Resources in Kansas (collectively, the "Plaintiffs"), and Magellan Ammonia Pipeline, L.P. ("Magellan"), Enterprise Products Operating, L.P. ("Enterprise"), and Mid-America Pipeline Company, L.L.C. ("MAPL") (collectively, the "Defendants" or "Settling Defendants").

## **INTRODUCTION**

A. The United States, on behalf of DOI in its capacity as natural resource trustee for federal Natural Resources, and the State of Kansas, KDHE and the Secretary of KDHE in their capacity as trustee for state Natural Resources in Kansas, concurrently with the filing of this Consent Decree, have joined in filing a Complaint in this action under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9606, et. seq., and the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1321, and various State laws, seeking the recovery of damages, including damage assessment costs, for injury to, destruction of, and loss of Natural Resources resulting from releases of hazardous substances into the environment.

B. The Complaint alleges that Magellan is the owner of, and Enterprise and MAPL are the operators of, an anhydrous ammonia pipeline from which there was a release of anhydrous ammonia on October 27, 2004, in Kingman, Kansas.

C. Numerous investigations have concluded that the release of anhydrous ammonia from the pipeline in Kingman, Kansas resulted in the contamination of aquatic resources with elevated levels of anhydrous ammonia in such concentrations and amounts as to cause injury to Natural Resources including, but not limited to, habitat loss, fish and macroinvertebrates in an unnamed tributary leading to Smoots Creek. The Parties agree that these investigations satisfy and are in full compliance with the Natural Resource Damages Assessment provisions of 43 C.F.R. Part 11, Subparts A-F.

D. The Settling Defendants do not admit any liability arising out of the occurrence alleged in the Complaint, including the alleged release of hazardous substances and Natural Resource Damages.

E. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that implementation of this Consent Decree will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, with the consent of the Parties to this Consent Decree, it is hereby ORDERED, ADJUDGED AND DECREED:

## **I. JURISDICTION AND VENUE**

1. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1367, Sections 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9607, 9613(b), 33 U.S.C. § 1321, K.S.A. 65-3452a *et seq.*, K.S.A. 65-3430 *et seq.*, and K.S.A. 65-161 *et seq.*, and the Court has personal jurisdiction over the Settling Defendants. Venue lies in this District pursuant to 28 U.S.C. § 1391(b), (c) and § 1395(a) and Section § 113(b) of CERCLA. For purposes of this Consent Decree only, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District.

## **II. PARTIES BOUND**

2. The obligations of this Consent Decree apply to and are binding upon the Plaintiffs and their departments, agencies and instrumentalities, and upon Settling Defendants and their respective successors and assigns. Any change in ownership or corporate status of a Settling Defendant, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the Settling Defendants' responsibilities under this Consent Decree. All obligations of the Settling Defendants under this Consent Decree are joint and several. The failure of one Settling Defendant to comply with a provision of this Consent Decree does not excuse non-compliance by the other Settling Defendant. The compliance with a provision of this Consent Decree by one Settling Defendant shall be deemed compliance with that provision by the other Settling Defendant.

### **III. DEFINITIONS**

3. This Decree incorporates the definitions set forth in Section 101 of CERCLA, 42 U.S.C. § 9601, and in Section 11.14 of the Natural Resource Damages (“NRD”) regulations, 43 CFR § 11.14 as well as 33 U.S.C. § 1321(f) Federal Water Pollution Act (“Clean Water Act”). In addition, whenever the following terms are used in this Decree, they shall have the following meanings:

a. “Kingman Anhydrous Ammonia Release” shall mean the release of anhydrous ammonia from the pipeline owned by Settling Defendant Magellan and operated by Settling Defendant MAPL that occurred near Kingman, Kansas on or about October 27, 2004. The precise location of the release was in the South Half of the Southwest Quarter of Section 21, Township 27 South, Range 6 West, Kingman County, Kansas.

b. “Damage Assessment Costs” shall mean all costs associated with the planning, design, implementation, and oversight of the Plaintiffs’ damage assessment process. The damage assessment process addresses the extent and quantification of the injury to, destruction of, or loss of Natural Resources and the services provided by those resources resulting from the release of hazardous substances, and the planning of restoration or replacement of such Natural Resources and the services provided by those resources, or the planning of the acquisition of equivalent resources or services, and any other costs necessary to carry out the Plaintiffs’ responsibilities with respect to those Natural Resource injuries resulting directly or indirectly from the releases of hazardous substances, including all related enforcement costs.

c. “Date of Lodging” shall mean the date on which the Plaintiffs give the Court notice of the Consent Decree, subject to the public comment period referred to in Section XIII.

d. “Day” means a calendar day unless expressly stated to be a “Working Day.”

e. “Defendants” or “Settling Defendants” shall mean Magellan Ammonia Pipeline, L.P., Enterprise Products Operating, L.P. and Mid-America Pipeline Company, LLC collectively.

f. “Effective Date” shall mean the date that the Court signs the Consent Decree and enters it as a judicial order.

g. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. “KDHE” shall mean the Kansas Department of Health and Environment.

i. “Natural Resource” or “Natural Resources” shall mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States or the State of Kansas.

j. “Natural Resource Damages” shall mean any past and future damages recoverable by the United States or the State on behalf of the public, for injury to, destruction of, loss of, loss of use of, or impairment of the services or functions of Natural Resources resulting from the Kingman Anhydrous Ammonia Release, including, but not limited to (i) Damage Assessment Costs; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost Natural Resources or of acquisition of equivalent Natural Resources; (iii) the costs of planning such restoration activities; (iv) compensation for injury, destruction, loss, loss of use, or impairment of Natural Resources; and (v) each of the categories of recoverable damages described in 43 C.F.R. 11.15 Part II and applicable requirements of the State of Kansas.

k. “NRDAR Fund” means DOI’s Natural Resource Damage Assessment and Restoration Fund.

l. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral.

m. “Parties” shall mean the Plaintiffs and Settling Defendants.

n. “Plaintiffs” shall mean the United States on behalf of DOI, and the State of Kansas, by and through KDHE and the Secretary of KDHE.

o. “Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

p. “State” shall mean the State of Kansas, including its departments, agencies, and instrumentalities.

q. “Trustees” shall mean the Natural Resource Damages Trustees who are



the Secretary of the Kansas Department of Health and Environment and the United States Department of Interior, Fish and Wildlife Service.

r. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

#### **IV. STATEMENT OF PURPOSE**

4. The mutual objectives of the Parties in entering into this Consent Decree are: (i) to provide herein for the payment by Settling Defendants of the costs of acquisition and management of property equivalent to the Natural Resources allegedly injured, destroyed, or lost as a result of the Kingman Anhydrous Ammonia Release; (ii) to provide for the transfer of the property provided for in Section VI, representing some equivalent Natural Resources and paid for by Settling Defendant Magellan, to the Wichita State University Foundation or another entity acceptable to the Trustees; (iii) to provide for payment in advance by Settling Defendants to KDHE for the benefit of the Wichita State University Foundation or another entity acceptable to the Trustees in accordance with a final restoration plan developed by KDHE and the Department of Interior Fish and Wildlife Services of all costs of future Natural Resource Damages relating to the Kingman Anhydrous Ammonia Release, including but not limited to the long-term management of such Natural Resources; (iv) to provide for reimbursement by the Settling Defendants of past Natural Resource Damage Assessment Costs incurred by the United States and the State of Kansas; (v) to resolve Defendants' liability for Natural Resource Damages as provided herein; and (vi) to avoid potentially costly and time-consuming litigation.

## **V. PAYMENTS**

5. The Settling Defendants shall pay a total of four hundred fifty-two thousand, five hundred and thirty five dollars (\$452,535.00) plus Interest as indicated in paragraph a. below to Plaintiffs as follows:

a. Within thirty (30) days of the Effective Date of this Consent Decree, the Settling Defendants shall make a payment of \$11,975.00 plus Interest calculated from the Date of Lodging to the United States to reimburse the DOI for past costs associated with assessing federal Natural Resource Damages arising from Kingman Anhydrous Ammonia Release. This payment shall be made by Electronic Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with current EFT procedures, referencing DOJ Case Number 90-5-1-1-06074/3, USAO No 2008V00282, NRDAR Account No. 14X5198, and "United States Natural Resource Damages Past Costs re: Kingman, KS." Payment shall be made in accordance with written instruction provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office of the District of Kansas after the Date of Lodging.

b. Within thirty (30) days of the Effective Date of this Consent Decree, Settling Defendants shall make a further payment of \$440,560.00 to the State by certified or cashier's check payable to the "Kansas Department of Health and Environment." The \$440,560.00 shall be used by KDHE for the assessment, planning, restoration, rehabilitation, replacement, and/or acquisition of the equivalent of injured

Natural Resources in the area surface waters impacted by Kingman Anhydrous Ammonia Release, and long-term management of such Natural Resources in accordance with a final restoration plan developed by the KDHE and the DOI's Fish and Wildlife Service.

The total amount paid under this paragraph \$440,560.00 shall be delivered to:

Bureau of Environmental Remediation  
Attn: Leo Henning  
Charles Curtis Building  
1000 SW Jackson, Suite 410  
Topeka, Kansas 66612-1367

## **VI. PROPERTY ACQUISITION**

6. The Settling Defendants shall make best efforts to arrange for the transfer of title, free and clear of all liens and encumbrances, to the Wichita State University Foundation or an alternate entity acceptable to the Trustees, of approximately 160 acres of riparian corridor and terrestrial habitat along Smoots Creek. The property to be acquired is the southwest quarter of Section 23, Township 27 south, Range 6 west, Kingman County, Kansas. The Parties know the property as the "Gerber Property" as indicated on Attachment No. 1.

7. The acquisition of the Gerber Property shall be made by payment by Settling Defendants of the purchase price and transfer of title to the Wichita State University Foundation or another entity approved by the Trustees. All real estate transaction costs including but not limited to the costs of surveying, platting, and title search shall be paid by the Settling Defendants.

8. In the event that Settling Defendants are not able to transfer title to the Gerber Property to the Wichita State University Foundation or an alternate entity

approved by the Trustees in accordance with this Section by January 31, 2009, Settling Defendants shall pay KDHE the amount of \$360,000.00 in Natural Resource Damages in lieu of the property acquisition described in Section VI. This payment required under Paragraph 8 shall be made by January 31, 2009 and is in addition to the payments required by Paragraph 5 above. This payment shall be made by the method described in Paragraph 5b above.

9. Trustees have reviewed and approved a draft conservation easement in accordance with the Uniform Conservation Easement Act, K.S.A. 58-3810 *et seq.* that is enforceable under the laws of the State of Kansas and is acceptable to the owner of the Gerber Property and all Parties, pursuant to which is attached hereto as Attachment No. 2 as of the Date of Lodging of this Consent Decree.

10. Defendants have submitted to the Trustees for review and approval a current title insurance commitment, or some other evidence of title for the owner of the Gerber Property that shows title to the land described in the easement to be free and clear of all prior liens and encumbrances or identifying clearly any such liens and encumbrances which is attached as Attachment No. 3.

11. At the time of title transfer to the Wichita State University Foundation or alternative entity approved by the Trustees, Settling Defendants shall update the title search to ensure that nothing has occurred since the effective date of the commitment to affect the title adversely and shall record the easement with the Register of Deeds of Kingman County, Kansas, and pay for the Gerber Property. Within fifteen (15) days of the recording of the easement, Settling Defendants shall direct the title insurance

company to provide the owner, with a copy to the Trustees, a final title insurance policy, or other final evidence of title acceptable to the owner and Trustees, and a certified copy of the original recorded easement showing the clerk's recording stamps.

12. Within forty-five (45) days after recording the approved conservation easement on the Gerber Property and payment for the property as set forth in Paragraph 10 above, Settling Defendants shall use their reasonable commercial efforts to transfer ownership of the Gerber Property, for no consideration, to the Wichita State University Foundation or another entity approved by the Trustees which is authorized to acquire and hold conservation easements under K.S.A. 58 - 3810 and amendments thereto, and is qualified at the time of transfer under Section 170(h) of the Internal Revenue Code, and amendments thereto, and the applicable regulations promulgated thereunder. The Trustees shall have sole discretion regarding their approval or disapproval of a proposed property recipient. Prior to making the property transfer of the acquired property, the Settling Defendants shall ensure that all real estate and other taxes applicable to the acquired property are paid in full and that no liens or encumbrances not reflected on the prior title search have been put on the property.

13. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their authorities and rights to obtain access and information under CERCLA, RCRA and any other applicable statute or regulations.

## **VII. PENALTIES FOR LATE PAYMENTS**

14. If any payment required by Sections V (Payments) or VI (Property Acquisition) is not made by the date specified in that Section, Settling Defendants shall

be liable for Interest and for the following stipulated penalties for each day such payment is late:

<u>Days Late</u>	<u>Penalty</u>
1 – 30	\$1,000/day
31 – 60	\$2,000/day
Beyond 60 days	\$3,000/day

15. Penalties shall accrue as provided in this Section regardless of whether Plaintiffs have notified Settling Defendants of the payment delinquency or made a demand for payment but Penalties are not required to be paid until thirty (30) days following receipt by Settling Defendants of a written demand by any of the Plaintiffs for payment of such stipulated penalties. Any such written notice and demand shall identify to which Plaintiff payment shall be made, with a copy to all parties to this Consent Decree.

16. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree. While the amount of any penalty may be split between the United States and State, as determined by the Plaintiffs, Settling Defendants shall not be required to pay to each Plaintiff the full amount of a penalty.

17. All stipulated penalties owed by Settling Defendants with respect to late payment of past costs to the United States shall be paid to the United States. All stipulated penalties owed by Settling Defendants with respect to payment of past costs to the State shall be paid to the State. All other stipulated penalties owed by Settling

Defendants shall be paid to NRDAR account described in Paragraph 5a. All payments of stipulated penalties shall be made as follows:

a. To the State:

By certified or cashier's check payable to the "Kansas Department of Health and Environment" and delivered to:

Bureau of Environmental Remediation  
Attn: Leo Henning  
Charles Curtis Building  
1000 SW Jackson, Suite 410  
Topeka, Kansas 66612-1367

b. To the NRDAR Account:

By certified or cashier's check payable to the "U.S. Department of the Interior" and delivered to:

U.S. Department of the Interior  
NBC/Division of Financial Management Services  
Branch of Accounting Operations  
Mail Stop D-2777  
7401 W. Mansfield Avenue  
Lakewood, Colorado 80235

The following information is to be included with the check:  
Account No. 14X5198 (NRDAR)  
Kingman, KS Ammonia Spill

18. In addition to the stipulated penalties and Interest on late payments as provided in this Section, if the payments required by Section V or VI of this Consent Decree or the stipulated penalties provided for by this Section are not made, Settling Defendants shall be liable for Interest on such penalties and any costs and attorneys fees incurred by Plaintiffs in collecting any amounts owing.

19. Payments due under this Section shall be in addition to any other remedies or sanctions that may be available to the Plaintiffs on account of Settling Defendants' failure to comply with the terms of this Consent Decree.

#### **VIII. COVENANT NOT TO SUE BY PLAINTIFFS**

20. Except as specifically provided in Paragraphs 23-24 of this Decree, Defendants' payments under Section V and the land acquisition costs or alternative payment to KDHE under Section VI fully resolve the Plaintiffs' natural resource damage claims against Defendants relating to the Kingman Anhydrous Ammonia Release. The Plaintiffs covenant not to sue or to take civil or administrative action against Settling Defendants for Natural Resource Damages resulting from the Kingman Anhydrous Ammonia Release under CERCLA, 42 U.S.C. § 9607, the Clean Water Act, 33 U.S.C. § 1321(f), or other applicable federal, State or common law. This covenant not to sue takes effect upon the Effective Date and is conditioned upon satisfactory performance by the Settling Defendants of their obligations under this Consent Decree. This Covenant Not to Sue extends only to Settling Defendants and does not extend to any other person.

21. The United States covenants not to sue or take administrative action against KDHE or other agencies of the State of Kansas for costs incurred or to be incurred by the Plaintiffs in assessing Natural Resource Damages resulting from the Kingman Anhydrous Ammonia Release or in overseeing projects related to the Kingman Anhydrous Ammonia Release under CERCLA, 42 U.S.C. § 9607, the Clean Water Act, 33 U.S.C. § 1321(f), or other federal, State or common law. These covenants take effect on the Effective Date.



22. The KDHE covenants not to sue or to take administrative action against the United States for costs incurred or to be incurred by the Plaintiffs in assessing Natural Resource Damages resulting from the Kingman Anhydrous Ammonia Release or in overseeing projects related to the Kingman Anhydrous Ammonia Release under CERCLA, 42 U.S.C. § 9607, the Clean Water Act, 33 U.S.C. § 1321(f), or other federal, State or common law. These covenants take effect on the Effective Date.

### **IX. RESERVATION OF RIGHTS**

23. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve their rights to institute proceedings against the Settling Defendants in this action or in a new action seeking recovery of Natural Resource Damages if conditions, factors or information involving the Kingman Anhydrous Ammonia Release, not known to the Trustees at the Date of Lodging of this Consent Decree are discovered that, together with any other relevant information, indicate that there is a threat to the environment, or injury to destruction of, or loss of Natural Resources of a type unknown or of a magnitude significantly greater than was known at the Date of Lodging of this Consent Decree which is attributable to Defendants. Except as provided in Paragraph 28 below, Settling Defendants preserve all of their defenses in such proceedings.

24. Notwithstanding any other provision of this Consent Decree, the covenants not to sue in Paragraph 20 shall apply only to matters addressed in that paragraph and Plaintiffs reserve all other claims including but not limited to:

a. claims based on a failure by the Settling Defendants to satisfy any requirement imposed upon it by this Consent Decree;

- b. claims for criminal liability;
- c. claims for recovery of the costs of removal or remedial action, injunctive relief or administrative order enforcement under any provision of federal or state law including but not limited to: Section 311 of the CWA, 33 U.S.C. § 1321 or Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606, 9607, including claims under Section 107(a)(4)(D) of CERCLA, 42 U.S.C. § 9607 (a)(4)(D), for the costs of any health assessment or health effects study carried out under 42U.S.C. § 9604(I); and
- d. claims for natural resource damages not resulting from the Kingman Anhydrous Ammonia Release.

#### **X. COVENANTS OF SETTLING DEFENDANTS**

25. The Settling Defendants hereby covenant not to sue or to assert any judicial, administrative or legislative claims or causes of action against the United States or the State, or their contractors or employees, with respect to Natural Resource Damages resulting from the Kingman Anhydrous Ammonia Release or the payments required by this Consent Decree, including, but not limited to:

- a. Any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;
- b. Any claims against the United States, including any department, agency or instrumentality of the United States or the state of Kansas, under CERCLA

Sections 107 or 113, relating to Natural Resources Damages resulting from the Kingman Anhydrous Ammonia Release;

c. Any claims against the State of Kansas before the Kansas joint committee on special claims relating to Natural Resource Damages resulting from the Kingman Anhydrous Ammonia Release.

#### **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

26. The Parties agree, and by entering this Consent Decree, this Court hereby finds, that the Settling Defendants are entitled as of the Effective Date, to protection from contribution actions or claims provided by Section 113 (f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), or other applicable law for "matters addressed" by this Consent Decree. The "matters addressed" in this Consent Decree are all Natural Resource Damages resulting from the Kingman Anhydrous Ammonia Release incurred by the United States, the State of Kansas or the Settling Defendants.

27. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. This consent decree does not affect, waive or in any way impair any agreements Settling Defendants may have between themselves. Except as provided by Paragraphs 20-22, each of the Parties, including the Settling Defendants, expressly reserve any and all rights (including, but not limited to, any right to contribution) defenses, claims, demands and causes of action that it may have against any person not a signatory hereto.

28. In any subsequent administrative or judicial proceeding initiated by the United States pursuant to Section IX (Reservation of Rights) for injunctive relief, recovery of response costs, penalties, natural resource damages or other relief relating to the Kingman Anhydrous Ammonia Release, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided however, that nothing in this Paragraph affects the enforceability of the Covenants Not to Sue by the United States and the State set forth in Section VIII of this Consent Decree.

29. The Settling Defendants agree that, with respect to any suit or claim for contribution brought by them for matters related to Natural Resource Damages relating to the Kingman Anhydrous Ammonia Release or this Consent Decree, they will notify the United States and the State in writing no later than sixty (60) days prior to the initiation of such suit or claim, unless the giving of such advance notice would subject such suit or claim to a defense that it is barred by the statute of limitations or other time-related defense.

30. The Settling Defendants also agree that, with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree, they will notify in writing the United States and the KDHE within ten (10) days of service of the complaint. In addition, Settling Defendants shall notify the United States and the KDHE within ten (10) days of receipt of any Motion for Summary Judgment with respect

to such a claim, and within ten (10) days of receipt of any order from a court setting such a case for trial.

31. Nothing in this Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611 or 40 C.F.R § 300.700(d).

## **XII. CONSENT DECREE MODIFICATIONS**

32. Any material modification of this Consent Decree shall be made by agreement of all of the Parties to this Consent Decree, in writing, and shall not take effect unless approved by the Court. Any non-material modification of this Consent Decree shall be made by agreement of all of the Parties to this Consent Decree in writing. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

## **XIII. LODGING AND PUBLIC COMMENT**

33. The Parties acknowledge that this Consent Decree will be subject to a public comment period of not less than thirty (30) days. Consequently, entry of the Decree after lodging shall be deferred to allow the time necessary for the Plaintiffs to obtain and evaluate public comments on this Consent Decree. The Plaintiffs reserve the right to withdraw their consent to this Consent Decree if comments received disclose facts or considerations that show that this Consent Decree is inappropriate, improper, inadequate, or otherwise not in the public interest. Settling Defendants consent to the entry of this Consent Decree by the Court without further notice. Settling Defendants further agree not to oppose entry of this Consent Decree by the Court or to challenge any

provision of the Consent Decree, unless either the United States or the State of Kansas has notified the Defendants in writing that they no longer support entry of the Consent Decree.

#### **XIV. NOTICE**

34. Any notice required hereunder shall be in writing and shall be delivered to the following:

As to the United States:

Section Chief  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
P.O. Box 7611  
Washington, D.C. 20044

As to the United States Department of the Interior:

Restoration Fund Manager  
Natural Resource Damage Assessment and Restoration Program  
U.S. Department of the Interior  
1849 C Street, NW, MS - 4449  
Washington, D.C. 20240  
Re: Kingman, Kansas Ammonia Spill Oct. 27, 2004

Field Supervisor  
Manhattan Ecological Services Field Office  
U.S. Fish and Wildlife Service  
2609 Anderson Ave.  
Manhattan, KS 66502

As to the Kansas Department of Health and Environment:

Leo Henning  
Environmental Assessment and Restoration Section  
Bureau of Environmental Remediation  
Charles Curtis Building  
1000 SW Jackson, Suite 410  
Topeka, Kansas 66612-1367

As to the Settling Defendant Magellan:

Associate General Counsel  
Magellan Ammonia Pipeline Company, L.P.  
One Williams center, Suite 2800  
Tulsa, OK 74121-2186

As to Settling Defendant Enterprise:

Raymond P. Albrecht  
Secretary and General Counsel  
Mid-America Pipeline Company, LLC  
1100 Louisiana Street  
Houston, TX 77210-4324

As to Settling Defendant MAPL:

Raymond P. Albrecht  
Secretary and General Counsel  
Mid-America Pipeline Company, LLC  
1100 Louisiana Street  
Houston, TX 77210-4324

35. Each Party to this Consent Decree may change the person(s) it has designated to receive notice for that party, or the addresses for such notice, by serving a written notice of such change on each of the other Parties to this Consent Decree.

#### **XV. SIGNATORIES/SERVICE**

36. Each undersigned representative of each Settling Defendant certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree, to legally execute this Consent Decree, and to bind the party he or she represents to this Consent Decree.

37. This Consent Decree may be signed in counterparts and such counterpart signature pages shall be given full force and effect.

38. Settling Defendants hereby agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of Civil Procedure and other applicable Local rules of this Court including, but not limited to, service of a summons.

#### **XVI. ENTIRE AGREEMENT**

39. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding between the Plaintiffs on the one hand and the Settling Defendants on the other hand with respect to the settlement embodied in the Consent Decree and supersedes all prior agreements and understandings, whether oral or written between the Plaintiffs and Settling Defendants. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

#### **XVII. JUDGMENT**

40. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the Plaintiffs and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

**IT IS SO ORDERED**



**DATED:** \_\_\_\_\_

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**UNITED STATES DISTRICT JUDGE**  
**DISTRICT OF KANSAS**

FOR THE UNITED STATES OF AMERICA:

WE HEREBY CONSENT to the entry of the Consent Decree in United States et al. v. Magellan Ammonia Pipeline L.P. et al. subject to the public notice and comment requirements of Section XIII of this Consent Decree.

Dated: \_\_\_\_\_

\_\_\_\_\_  
BRUCE S. GELBER  
Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice

Dated: \_\_\_\_\_

\_\_\_\_\_  
ELIZABETH L. LOEB  
Trial Attorney  
Environmental Enforcement Section  
United States Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
(202) 514-4180 fax  
(202) 616-8916 direct

Dated: \_\_\_\_\_

ERIC F. MELGREN  
United States Attorney  
District of Kansas

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EMILY METZGER  
Assistant United States Attorney  
Kansas State Bar No. 10750  
1200 Epic Center, 301 N. Main  
Wichita, Kansas 67202  
(316) 269-6481

FOR THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT:

WE HEREBY CONSENT to the entry of the Consent Decree in the United States et al. v.

Magellan Ammonia Pipeline L.P. et al., subject to the public notice and comment requirements of

Section XIII of this Consent Decree.

Dated: 9-2-2008

RODERICK L. BREMBY

Secretary

Kansas Department of Health and Environment

L. PATRICIA CASEY

Special Assistant Attorney General

Kansas Department of Health and Environment

FOR SETTLING DEFENDANT MAGELLAN AMMONIA PIPELINE:

WE HEREBY CONSENT to the entry of the Consent Decree in United States et al. v.  
Magellan Ammonia Pipeline L.P. et al. subject to the public notice and comment  
requirements of Section XIII of this Consent Decree.

Date 9-15-08

Name Richard A. Olson  
Title Senior Vice President of Operations  
Address One Williams Center, Ste. 2800, Tulsa, OK 74172  
Phone 918-574-7500  
Fax 918-574-7003

Agent Authorized to Accept Service on Behalf of Above Signed Party:

Name: The Corporation Co.

Title: \_\_\_\_\_

Address: 515 S. Kansas Ave.

Topeka, KS 66603

Phone Number: 785-233-0593

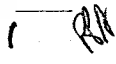
FOR SETTLING DEFENDANT ENTERPRISE PRODUCTS OPERATING, LLC

WE HEREBY CONSENT to the entry of the Consent Decree in United States et al. v.

Magellan Ammonia Pipeline L.P. et al. subject to the public notice and comment

requirements of Section XIII of this Consent Decree.

Date 9/12/08

Name Michael Creel   
Title President  
Address 1100 Louisiana St., Houston, TX 77002  
Phone \_\_\_\_\_  
Fax \_\_\_\_\_  
Email \_\_\_\_\_

Agent Authorized to Accept Service on Behalf of Above Signed Party:

Name: Raymond P. Albrecht

Title: Secretary and General Counsel

Address: 1100 Louisiana Street

Houston, TX 77210-4324

Phone Number: 713-381-8380

FOR SETTLING DEFENDANT MID-AMERICA PIPELINE COMPANY, LLC

WE HEREBY CONSENT to the entry of the Consent Decree in United States et al. v.  
Magellan Ammonia Pipeline L.P. et al. subject to the public notice and comment  
requirements of Section XIII of this Consent Decree.

Date 9/12/08

✓ Name Jim Collingsworth *JC*  
Title President  
Address 1100 Louisiana St., Houston, TX 77002  
Phone \_\_\_\_\_  
Fax \_\_\_\_\_  
Email \_\_\_\_\_

Agent Authorized to Accept Service on Behalf of Above Signed Party:

Name: Raymond P. Albrecht

Title: Secretary and General Counsel

Address: 1100 Louisiana Street

Houston, TX 77210-4324

Phone Number: 713-381-8380